United States Court of Appeals

for the

District of Columbia Circuit

TRANSCRIPT OF RECORD

149

No. 24,480

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

UNITED STATES OF AMERICA

v

PAUL D. JACKSON,

Appellant

Appeal from the United States District Court
for the District of Columbia

BRIEF FOR THE APPELLANT

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No. 24,480

UNITED STATES COURT OF APPEALS

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v

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Statement of the Issues Presented for Review

The issues presented for review in this appeal are as follows:

1. In a case in which the defendant was charged with murder in the second degree, the government's expert witness testified that the blood clot which he observed in the course of his autopsy to be the cause of death was "compatible" with the blows allegedly struck by the defendant. He also

testified that two falls by the deceased of which there was evidence were also "compatible" with the cause of death. Was such testimony sufficient to sustain the government's burden of proof beyond a reasonable doubt?

2. Did the trial Court err in refusing to instruct the jury that if it were merely possible that the alleged blows had precipitated the bleeding, and if it were equally possible that the falls had precipitated the bleeding, they were obliged to acquit the defendant?

3. Did the trial court err in instructing the jury that they were at liberty to reject the testimony of the experts in the case?

This case has not previously been before this case. However, the appellant has sent to the Chief Judge a pro se motion for release pending the determination of the appeal.

References to Rulings

There was no oral or written opinion in which the Court set forth the basis of the order or judgment presented for review by this Court.

Statement of the Case

Paul D. Jackson, the appellant was charged [R 2][1] with murder in the second degree in an indictment which reads as

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[1] For convenience, the duplicate transcript of the pleadings is indicated by the symbol "R". The transcript of the testimony is indicated by the symbol "T".

as follows:

> On or about October 24, 1969, within the District of Columbia, Paul D. Jackson, with malice aforethought, did strike and beat Volta L. Jackson about the head and did thereby cause injuries to the said Volta L. Jackson from which she did die, on or about November 4, 1969.

The defendant pleaded not guilty to this indictment on February 26, 1970 [R 5]. The case was tried to a jury which, on June 25, 1970, found him not guilty of murder in the second degree. However, the jury did find Jackson guilty of manslaughter [T 326]. He was sentenced to imprisonment for a term of four to twelve years [R 11].

Volta L. Jackson was the mother of Paul D. Jackson, the defendant [T 34]. Both of them lived at 1413 Carrollsburg Place, SW [T 35, 260]. Mrs. Jackson was found dead in her bed on November 3, 1969 [T 117]. The police first responded to the call about 11:30 on the night of November 3, and found Mrs. Jackson lying in bed [T 118]. Subsequently, on November 5, 1969, an autopsy was performed [T 69], which revealed that Mrs. Jackson had died because of a subdural hematoma [T 206]. While the time of the death was not fixed with precision, it is probable that Mrs. Jackson died on November 2 or in the early morning of November 3.

Carolyn Jackson, a grand-daughter who lived with Mrs. Jackson [T 70] woke up at about 8:30 on the morning of November 3. At that time, her grandmother was in bed. Carolyn went to school, and returned home about 3:30 in the afternoon, at which time Mrs. Jackson was still in bed. Carolyn

then went across the street to do her homework with a girl, and returned home about six o'clock [T 81]. At that time, Mrs. Jackson was still in bed [T 82]. During the entire day, Mrs. Jackson had not moved [T 84]. At the time the police first saw Mrs. Jackson, rigor had set in [T 123]. The room in which she was lying was moderately warm, and the body was covered [T 123]. Dr. Kim stated that rigor mortis usually starts in about six hours and lasts about 24 to 30 hours under normal room temperature and normal humidity [T 217]. The condition of the stomach contents indicated that Mrs. Jackson had eaten about four or five hours before she died [T 217].

The blood clot from which Mrs. Jackson died was about 100 cubic centimeters, about 50 of which was liquid [T 219]. It was dark red [T 219]. Dr. Kim saw a suggestion of a filmy membrane covering the clot, of the kind which develops from the second week and later [T 220]. Adhesions, which also develop in the second week or later, were also observed. [T 220, 221]. The clot was more than four or five days old [T 220], and it was "not likely" older than 30 days [T 221]. Dr. Kim, the government's witness, testified [T 221]:

> We can guess reasonably in a narrow range which I said 10 to 20 days. But I cannot pinpoint that is the absolute range to set in this case. So this is an estimation of the age, but which covers maybe a few days beyond or further than the estimation.

Dr. Kim was unable to say whether the clot was at the front of the head [T 222], identity the blood vessels from

which the bleeding came [T 222], or from where the blow came [T 222, 223]. Dr. Kim said:

> Q. Was there anything you saw, Doctor, that enabled you to tell where the blow came from, or the direction of the blow?
>
> A. Only reasonable way -- That is mere speculation. When you have left side hematoma, it is more like from the left side. But it could be from right side. So that is my opinion.
>
> Q. Doctor, it could even be an indirect blow, couldn't it?
>
> A. Yes.

Dr. Kim stated his opinion that the cause of death was unnatural, and defined his meaning of that term in the following testimony [T 223]:

> Q. I think you said that this was an unnatural cause of death.
>
> A. More likely unnatural, yes. More likely unnatural.
>
> Q. Would you tell the jury what you mean by unnatural?
>
> A. Unnatural means not spontaneous hemorrhage. Unnatural means the chance to have an external blow by means whatever is great in this case rather than it developed without any reason.
>
> Means a spontaneously hemorrhage we have occasionally. But that is so rare. And I do not see any such spontaneous cause of hemorrhage in this case. So unnatural means simply other than natural.
>
> Other than natural means, some external force applied to the head. I simply mean that.
>
> Q. When you say unnatural, it could be

just any force? Isn't that right?

A. Yes, sir.

Dr. Kim stated that he agreed with the following description of subdural hemorrhage [T 227, 228]:

> Relatively trivial blows or falls on the head which are suffered daily without harmful results by many individuals and which have been experienced previously by victims of subdural hemorrhage without harmful effect may be responsible for a hemorrhage at a critical moment.
>
> Indeed, falls without injury to the head have been apparently efficient in producing the lesion.

Dr. Kim stated that the alleged blows struck by Paul D. Jackson on October 24, 1969 [T 215], a fall on the same day [T 229], and a fall on October 17, 1969 [T 229], were each "compatible" with the clot which he observed at the time of the autopsy [T 231]. Dr. Kim testified that "every trauma sitting in this period [10 to 20 days before Mrs. Jackson's death] is compatible." Dr. Marion Mann, called by the defendant as an expert, stated that he could not rule out any of the three incidents involved as the cause of the subdural hemorrhage, and that he could not select with reasonable medical certainty any one of the three as being the cause of the bleeding [T 294].

The events of October 24, 1969, which the government alleges caused the death of Mrs. Jackson may be summarized as follows:

On that evening a card game, in which Barbara Williams,

Mrs. Jackson, Mrs. Beatrice Smith, and Mr. Richard Thomas were participants, was in progress at the Jackson home [T 35]. Later, Paul Jackson came in, and after eating dinner, joined the game [T 36]. Sometime during this card game, an altercation developed between Paul Jackson and Barbara Williams [T 36]. Jackson "drug" Mrs. Williams into the living room, and hit her [T 36]. At this point, Mr. Thomas intervened in the dispute between Jackson and Mrs. Williams [T 37]. There is some confusion as to the exact details, but all of the witnesses agree that at this time, the altercation between Jackson and Mrs. Williams ceased [Mrs. Williams, T 37, 42; Mr. Thomas, T 54; Mrs. Smith, T. 140].

Then, Mrs. Jackson, who had been in the kitchen, came into the living room, addressed an obscenity toward Paul Jackson [T 43], and then began to throw dishes at Paul Jackson [T 44; T 54; T 73].

The only government witness who claimed to have seen Paul Jackson strike his mother was Carolyn Jackson, the 12 year old grand-daughter. Her testimony in this regard was that her "grandmother went in the kitchen and threw some plates at him. And then she tripped over the rug. That's when Paul came after her." [T 73] Carolyn says that Paul hit his mother twice with his fist, and kicked her twice [T 73]. On cross-examination, Carolyn testified that she had never before seen Paul Jackson hit her grandmother [T 85], although she had, about a year previously, seen her grandmother make an unpro-

voked attack on Paul Jackson by throwing scalding water on him [T 86] while he was asleep [T 253].

Paul Jackson testified that he had not struck or kicked his mother. He said that he was attempting to prevent her throwing dishes at him, and that they fell to the floor several times while this was going on [T 267]. His testimony that he did not understand his mother's conduct [T 265] is corroborated by the testimony of the government's witness, Richard Thomas [T 55].

There is no substantial disagreement about the fact that Mrs. Jackson, who was 56 years old at the time of her death. [T 225], had used alcohol consistently. Although the witnesses differed as to the amount of alcohol which she drank, all of them confirmed the fact that she did drink. The extent of her drinking is indicated by the fact that the autopsy revealed a fatty degeneration of the liver, a condition often associated with the excessive use of alcohol [T 225].

ARGUMENT

I. The government's evidence was insufficient to prove that any act of Paul D. Jackson caused the death of Volta L. Jackson. The motion for judgment of acquittal should have been sustained.

a. Evidence which establishes only a possibility that the acts of a defendant caused the death are in law insufficient to sustain a conviction of homicide.

The prosecution had the burden of proving beyond a reasonable doubt each of the elements of the offense of man-

slaughter. One of the essential elements of this offense is that the death was caused by a criminal agency. Murray v United States, 53 App DC 119, 127, 288 F 1008 (1923). This requirement is, of course, a matter of text-book law. The test of whether the prosecution has sustained its burden was stated in People v Brengard, 265 NY 100, 191 NE 850, 93 ALR 1465 (1934) in this language:

> The question whether the act constitutes murder is necessarily one of fact. An obscure or merely probable connection between an assault and death, will, as in every case of crime, require acquittal of any degree of homicide. The proximate relationship must, of course, be clearly proved beyond a reasonable doubt. A duty rests upon the trial judge so to instruct the jury and, in the absence of such instruction or in the event of a failure of proof, a similar duty would rest upon a court of review to reverse a judgment of conviction.

The failure of the government to establish that any act of Paul D. Jackson caused the death of Volta L. Jackson arises from the nature of the ailment from which she died. There is no dispute that the primary cause of Mrs. Jackson's death was a subdural hemorrhage which resulted in a blood clot. However, the issue is, what precipitated the bleeding which created the blood clot? All of the evidence, taken in the light most favorable to the government's contentions, leaves that issue in serious doubt, to say the least.

The deputy coroner indicated that the clot was more than six and less than thirty days old [T 221], and asserted that, "We can reasonably guess in a narrow range which I said 10

to 20 days." [T 221] His specific description of the presence of an observable membrane in connection with the clot and his finding of adhesions were significant, Dr. Kim said, since these were conditions which usually develop after two weeks [T 220]. Mrs. Jackson's death occurred on either November 2 or November 3, although the evidence indicated the probability that the death actually occurred sometime during the night of November 2 or the early morning of November 3. Thus, if the death had a time relationship to the acts charged against Paul D. Jackson which was within the narrow range of Dr. Kim's "guess" as to the narrow range of the age of the clot, it barely did so. Of course, what is important here is not whether a period of ten days, calculating by minutes and seconds, elapsed between the time Paul Jackson is supposed to have struck his mother and her death. On the contrary, the importance lies in the fact that the entire cornerstone of the government's theory of causation is that bare time-relationship, and nothing else.

A proper evaluation of the government's theory requires some understanding of the nature and etiology of subdural hemorrhages, illnesses which are, to say the least, obscure to physicians who have to deal with and treat them.

> In many cases the minor character of the traumatism that leads to a subdural hemorrhage is striking. Relatively trivial blows or falls on the head, which are suffered daily without harmful results by many individuals and which have been experienced

> previously without harmful effects, may be responsible for a hemorrhage at a critical moment. Indeed, falls without injury to the head have been apparently efficient in producing the lesion.
>
> The relation of alcoholism to the condition is close. In this series, 54 per cent of the victims were addicted to alcohol. In a larger clinical series, alcoholic addiction was reported in 40 per cent. The higher mortality rate in alcoholic individuals is probably responsible for the difference in this respect.[1]

The government's expert, Dr. Kim, testified that very frequently subdural hemorrhages result from a trauma so trivial that it is in fact impossible to identify it [T 226]. His testimony makes it clear that any such trauma, identified or unidentified in the range of 10 to 20 days prior to Mrs. Jackson's death, was a possible cause of the bleeding [T 231]. Dr. Kim and Dr. Mann agreed that subdural hemorrhages do occur spontaneously [Dr. Kim, T 223; Dr. Mann, T 290], although both agreed that almost all subdural bleeding is related to traumatic injury. Both of the physicians stated that bleeding is more likely to occur in elderly people and in those who use alcohol excessively [Dr. Kim, T 225; Dr. Mann, T 289]. The experts were in agreement that the force could be an indirect one [Dr. Kim, T 223; Dr. Mann, T 291], and both agreed that subdural hemorrhage can be pre-

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[1] Leary, Subdural Hemorrhages, 103 J of Amer Med Asso, 897, 899, Sept 22, 1934. Dr. Kim testified that he recognized the author of this article as an authority, was familiar with the article, and agreed with it [T 227, 228].

cipitated by a fall [Dr. Kim, T 227-228; Dr. Mann, T 291].

Three possible precipitating causes for the bleeding were suggested by the testimony in this case. The government's theory was that the blows to the head were the precipitating cause. Whether such blows were in fact struck is a matter of conflict in the evidence. But there is no conflict in the evidence that Mrs. Jackson suffered at least two falls during the period that Dr. Kim indicated as the age of the blood clot. Paul Jackson testified that the week before, on October 17, Mrs. Jackson, who was intoxicated at the time, entered the house after he and Barbara Williams were asleep. At that time, she stumbled and fell [T 270, 271]. His testimony as to this incident was corroborated by the government's witness, Barbara Williams, although she could not date the event [T 47]. Carolyn Jackson, the government's principal witness, testified that while her grandmother was throwing dishes at Paul Jackson, she tripped over the rug and fell [T 92]. At the time of this fall, Paul Jackson was nowhere near his mother [T 92], and the blows are supposed to have been struck after Mrs. Jackson sprawled out flat on her back [T 104].

The testimony makes it clear that any one of these incidents could have precipitated the bleeding. Dr. Mann said that he could not say which of the three incidents had triggered the bleeding, that he could not rule out any one of the three, and that he could not select any one of the three with

reasonable medical certainty as being the cause of the bleeding [T 294]. Dr. Kim stated that each of the incidents was compatible with the clot which he observed. He could not say with reasonable medical certainty that the fall on the same day--October 24--did not cause the bleeding [T 230]. It is clear that Dr. Kim was basing his opinion strictly on the time element involved in his estimate as to the age of the clot. He said, "So every trauma sitting in this period is compatible" with the subdural hematoma [T 232].

With the evidence in this posture, it was error for the Court to allow the jury to guess as to the cause of death. The evidence establishes three possible explanations of the trauma, and neither expert could say with any certainty which of the three actually precipitated the bleeding. Paul Jackson, of course, was not responsible for either of the two incidents about which there is no dispute in the record. The most that can be said, taking the government's testimony in the light most favorable to the government, the blows he is supposed to have struck could possibly have caused the bleeding.

We think that the law properly applicable to this situation was correctly stated in State v Rounds, 104 Vt 442, 160 A 249, 254 (1932):

> In a homicide case, where the life or liberty of a citizen is at stake, and where the guilt of the accused must be established beyond a reasonable doubt, the causal connection between the death

> of the decedent and the unlawful acts of the respondent cannot be supported on mere conjecture and speculation. In Wellman v Wales, 98 Vt 437, 440, 129 A 317, 319, we said that: "Evidence which merely makes it possible for the fact in issue to be as alleged, or which raises a mere conjecture, surmise, or suspicion, is an insufficient foundation for a verdict." There being no competent evidence tending to establish an essential element of the crime charged, the respondent's motion for a directed verdict should have been granted.

Where, as it appears here from the expert testimony, that it is equally probable that death resulted from one cause as from another, and the defendant is not responsible for one of those causes, any determination of the cause of death is necessarily speculative and conjectural. State v Kindle, 71 Mont 58, 227 P 65 (1924); Seagroves v State, 198 Tenn 633, 281 SW2d 644 (1935); State v Rounds, 104 Vt 442, 160 A 249 (1932); Terry v Commonwealth, 171 Va 505, 198 SE2d 911 (1938); State v Roush, 95 W Va 132, 120 SE 304 (1923). The mere fact that Mrs. Jackson's death occurred at a time --by the barest margin--at which the blows said to have been inflicted by Paul Jackson made those blows "compatible" with the possible cause of death, cannot possibly be said to be adequate proof to sustain the government's burden, especially in light of the fact that there were two other equally "compatible" possible causes. Evidence which does no more than establish a time coincidence does not establish causation. Kilgore v State, 95 Ga App 462, 99 SE2d 72, 73 (1957).

The trial Court should have directed a judgment of acquittal because the very best that can be said for the case of the government is that it establishes a possibility that Paul Jackson caused the death of his mother. Possibility is not enough to sustain the government's burden of proving all the necessary elements beyond a reasonable doubt. State v Bynum, 69 Ohio App 317, 43 NE2d 636 (1942); Kilgore v State, 95 Ga App 462, 99 SE2d 72, 75 (1957).

b. Expert testimony was necessary in order to establish the cause of death. The expert testimony in this case established no more than the possibility of a causal relationship between the alleged blows and the death of Mrs. Jackson.

It is difficult to imagine a case in which the cause of a person's death would be a question more obscure than it is in this case. The government alleges that on October 24, 1969, Paul Jackson struck his mother twice with his fists [T 72], and, wearing tennis shoes [T 100], kicked her twice [T 72]. Although there is testimony that the next day, Mrs. Jackson exhibited bruises on her face and complained of headaches, she was never unconscious [T 93], and continued to work every day [T 80]. Nine or ten days later, she was found dead, lying in her bed [T 117, 118]. There were, at the time of her death, no evidences of physical violence or trauma which were visible to the deputy coroner who performed the autopsy [T 211]. Taking the government's testimony at its full value, the blows were not the kind of attack which reasonably would be expected

would reasonably be expected to cause death. Cf, Kilgore v State, 95 Ga App 462, 99 SE2d 72 (1957). It was only after the autopsy was performed that there was anything to indicate the possibility of external trauma as the cause of death.

Instead of clarifying the cause of death, the autopsy actually made it more uncertain. It revealed that death to have been the result of a subdural hemorrhage, which began, according to the narrow range at which the coroner guessed, between 10 and 20 days previous to the death. Although the fatal consequences of this type of internal bleeding are well-known, its etiology is obscure. For example, neither physician who testified was willing to rule out the possibility of totally spontaneous subdural bleeding [Dr. Kim, T 223; Dr. Mann, T 290]. Trivial [Dr. Kim, T 228; Dr. Mann 290] and indirect blows [Dr. Kim, T 223; Dr. Mann, T 291] may precipitate the bleeding, especially in elderly people and in those addicted to alcohol [Dr. Kim, T 225; Dr. Mann, T 289]. An authoritative commentator[1] reports that falls without injury to the head have apparently been efficient in producing such a lesion. He says that a fall of two or three feet has caused the bleeding.[2] In Mrs. Jackson's case, the coroner was unable to determine the point of the rupture [T 222], or to identify the blood vessels which were ruptured [T 222], or

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1 Leary, Subdural Hemorrhages, 103 J of Amer Med Asso, 897, Sept 22, 1934.

2 Ibid.

to reach a conclusion as to the direction from which the force came [T 222, 223]. The evidence shows that Mrs. Jackson suffered at least two falls in the precise period in which the deputy coroner "guessed" the bleeding began. The government produced no real evidence to exclude the possibility that there were other falls during the six to thirty days prior to Mrs. Jackson's death, the period in which the bleeding might have begun.

The need for expert testimony to establish the necessary causal relationship in this case is obvious. The rule by which the need for such testimony is determined was stated by the Court in State v Rounds, 104 Vt 442, 160 A 249, 253 (1932):

> There are many cases where the facts proved are such that any layman of average intelligence would know, from his own experience, that the injuries were the cause of death. In such a case the requirements of the law are met without expert testimony. Waller v People, 209 Ill 284, 70 NE 681. But where, as here, the physical and mental processes terminating in a death are obscure and abstruse, and concerning which a layman can have no "well grounded opinion," there is no proper foundation for a finding by the jury without expert medical testimony.

See also: Witt v Commonwealth, 305 Ky 31, 202 SW2d 612 (1947); State v Minton, 234 NC 716, 68 SE2d 844, 31 ALR2d 682, 689 (1952); Smith v State, 43 Tex 643 (1875).

How obscure was the causal relationship between the alleged blows and kicks and the subdural hemorrhage which resulted in Mrs. Jackson's death? So obscure that neither

physician could do more than state that they were "compatible" or "could not be ruled out" as the cause of the bleeding. But the same physicians could not say with reasonable medical certainty that the falls did not cause the bleeding, and both indicated that the falls and the blows were equally compatible with the blood clot which was observed after Mrs. Jackson's death--a compatibility which is based, as their testimony shows, exclusively on the coincidence of time.

In a case so tenuous as the government's here, the language of a dissenting opinion, quoted with approval by the Court in Kilgore v State, 95 Ga App 462, 99 SE2d 72, 75 (1957) seems particularly apposite:

> In spite of the testimony of experts who swear that they could only speculate as to the cause of death, may a jury say, or may this court say, "We know and are convinced beyond a reasonable doubt that the wound inflicted caused the death"? * * * Can it be said that the jury's common knowledge is so superior to that of the sworn expert witness that it knows absolutely while they, [the experts] the doctors, still "see through a glass darkly"?

II. The Court below refused to instruct the jury that if the government proved no more than a possibility that an unlawful act on the part of Paul Jackson precipitated Mrs. Jackson's internal bleeding, it had failed to prove the homicide. This refusal was prejudicial error.

As we have pointed out, the expert testimony was limited to testimony that the blows and kicks allegedly struck by Paul Jackson were compatible with the blood clot which was discovered during the autopsy on Mrs. Jackson's body, and,

because they were said to have occurred during the period in it was estimated the bleeding began, were a possible cause of that bleeding. However, the evidence also demonstrated, without contradiction, that during the same period, Mrs. Jackson experienced at least two falls. The experts were agreed that these falls were also compatible in time and therefore possible causes of the bleeding.

Under these circumstances, the defendant requested [R 7] that the Court instruct the jury as follows:

> It is the duty of the prosecution to prove beyond a reasonable doubt that the subdural bleeding which was the primary cause of the death of Volta Lucy Jackson was precipitated by an unlawful act of Paul D. Jackson. If, upon consideration of all the evidence, you find that it is merely possible that such an unlawful act precipitated the bleeding, and that it is equally possible that such bleeding was precipitated by an accident, or by Mrs. Jackson's own act, then the government has failed to sustain its burden, and you should find the defendant not guilty.

The Court refused to give this instruction [R 7] and nowhere was the jury advised that the establishment of a mere possibility was insufficient to sustain the government's burden. The Court thus refused to give any instruction setting forth the defendant's theory of the case, a theory which, beyond possibility of dispute, had substantial support in the evidence. Indeed, we think this theory was uncontradicted by any competent evidence.

The instruction correctly stated the law. A mere pos-

sibility that the death may have resulted from the unlawful act charged is not sufficient to sustain the burden resting on the prosecution. It does not support a conviction of homicide in any degree. People v Brengard, 265 NY 100, 191 NE 850, 93 ALR 1465 (1934); State v Bynum, 69 Ohio App 317, 43 NE2d 636 (1942); Seagroves v State, 198 Tenn 633, 281 SW2d 644 (1955); Terry v Commonwealth, 171 Va 505, 198 SE 911 (1938); State v Roush, 95 W Va 132, 120 SE 304 (1923). In Terry v Commonwealth, supra (198 SE at p 913), the Court said:

> It is, therefore, apparent from the testimony of the only witness introduced by the Commonwealth who was in a position to speak with authority, that it is equally probable that death was the result of natural causes as it was of the injuries received in the accident.
>
> * * * * * *
>
> . . . The burden was upon the Commonwealth to prove that the unlawful act of the accused was the efficient cause of the death of William Fox.
>
> In Williams v Commonwealth, 130 Va 778, 107 SE 655, 656, we said: "'Where there is evidence tending to criminate, the jury is almost uncontrollably the judge of its force and weight, and of the proper inferences from the facts proven.' * * * But in the case before us the evidence before the jury, when regarded most favorably for the commonwealth, left it, to say the least, equally probable that the death of the deceased was due to the natural cause of indigestion, as the result of over-eating * * * as that the death was due to any cause for which the accused could be said to be responsible. So that there is no evidence tending to exclude the hypothesis that the death of the deceased was due to such natural cause alone."

> A citizen should not be deprive of his liberty or his life on a mere possibility . . .

We challenge the government to cite a single American authority to the contrary.

The refusal to instruct the jury to this effect is clearly error, and is clearly prejudicial. In State v Roush, 95 W Va 132, 120 SE 304, 307 (1923), the court said:

> The theory of the defense was that the blows struck by Roush were not the cause of the death; that the blood clot was the result of the excessive use of poisonous liquors, bringing about apoplexy. Instruction No. 28, offered by defendant, and refused, would have told the jury, if given, that it was not sufficient for them to surmise that the licks struck might or possibly or probably did result in the death, but that they must believe from all the evidence, beyond a reasonable doubt, that the death was the actual result of the blows, before they could find the defendant guilty of manslaughter. The instruction correctly states the law applicable to the facts proven. It went to the very heart of the case, and should have been given.

III. The Court below incorrectly instructed the jury that it could disregard the testimony of the experts. In this instruction, it misled the jury, and permitted it to speculate and conjecture as to the relationship between the alleged blows and the death of Mrs. Jackson.

The Court below instructed the jury [R 309]:

> In this case, we had the testimony of two doctors, two pathologists, who were permitted to qualify as experts and express their opinion. An expert in a particular field is permitted to give his opinion in evidence.
>
> You are not bound by the opinion of such expert. You should consider his testimony

> with the other evidence in the case and give it such weight as in your judgment it is fairly entitled to receive.

Under the circumstances of this case, this instruction was patently erroneous. As we have pointed out, supra, pp. 15-19, expert testimony was absolutely necessary in order to establish the causal relationship, if any, between the acts of Paul Jackson and the death of Lucy Jackson. As a matter of fact, except for the testimony of Dr. Kim, the government introduced no evidence at all which would connect the death of an elderly woman in bed in the night-time with the blows which it said were struck nine or ten days before.

Since there was no substantial dispute between the two experts as to the ultimate fact--that Mrs. Jackson died as a result of subdural bleeding which might have been precipitated by the alleged blows, or might have been precipitated by either of at least two falls--the jury, in order to disregard the testimony of one, would necessarily disregard the testimony of both.

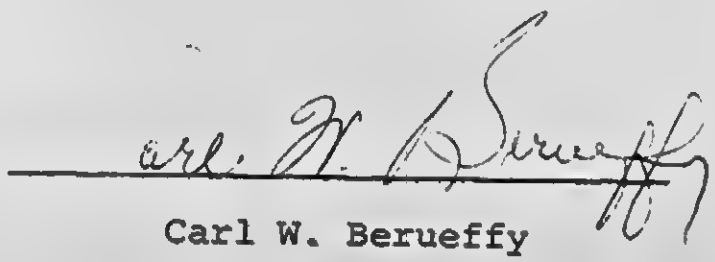
The effect of the instruction was to inform the jury that it could disregard the testimony of both experts, and on the basis of its own knowledge of the obscure and delicate medical questions inherent in the subject of subdural bleeding, make its own guess as to which one of the compatibles it would select as the cause, beyond reasonable doubt, of the bleeding. A verdict founded upon such unrestricted guessing by the jury obviously can not stand. Cf. Kilgore v State, 95 Ga App 462, 99 SE2d 72 (1957).

Conclusion

The evidence in this case was totally insufficient to establish the causal relationship between the alleged acts of Paul Jackson and the death of Lucy Jackson. Because the government failed to sustain its burden of proving this essential element of the offense beyond a reasonable doubt, the motion for a judgment of acquittal should have been sustained.

However, short of that, the minimum requirement of fairness was that the Court specifically advise the jury that it could not guess or speculate, and that if it found that it was merely possible that such a causal relationship existed, it should acquit the defendant. Instead, the trial Court told the jury that it was not bound by the expert testimony, and thus permitted it to guess without any limitation at all.

Because of these errors, the judgment should be reversed and the case remanded with instructions to dismiss the indictment.



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Attorney for the Appellant
(Appointed by this Court)

Certificate of Service

I certify that I served the foregoing Brief for the Appellant by delivering two copies thereof to the United States Attorney, United States Court House, Washington, D.C., this 5th day of October, 1970.

Carl W. Berueffy

Attorney for the Appellant
(Appointed by this Court)

BRIEF FOR APPELLEE

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 23,[illegible]

UNITED STATES OF AMERICA, APPELLEE

v.

PAUL D. JACKSON, APPELLANT

Appeal from the United States District Court
for the District of Columbia

THOMAS A. FLANNERY,
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JOHN R. GAIL, JR.,
BARRY W. LOVING,
Assistant United States Attorneys.

Cr. No. 207-70

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OTHER REFERENCES

* Cases chiefly relied upon are marked by asterisks.

ISSUES PRESENTED *

In the opinion of appellee, the following issues are presented:

I. Was there sufficient evidence of the cause of death?

II. Was the court's instruction on cause of death, which included the instruction requested by appellant, proper?

* This case has not previously been before this Court.

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 24,480

UNITED STATES OF AMERICA, APPELLEE

v.

PAUL D. JACKSON, APPELLANT

Appeal from the United States District Court for the District of Columbia

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BRIEF FOR APPELLEE

COUNTERSTATEMENT OF THE CASE

By indictment filed February 9, 1970, appellant was charged with one count of second-degree murder (22 D.C. Code § 2403). Trial was commenced on May 22, 1970, before the Honorable John H. Pratt, sitting with a jury. On May 25, 1970, the jury returned a verdict of not guilty of second-degree murder but guilty of the lesser included offense of manslaughter (22 D.C. Code § 2405). On June 24, 1970, appellant was sentenced to a term of imprisonment for four to twelve years. This appeal followed.

The Government's evidence revealed that on the evening October 24, 1969, Volta Lucy Jackson, the decedent and mother of appellant, was engaged in a card game in the kitchen of her home at 1413 Carrollsburg Place, S.W. Participating in the game were the decedent, Richard Thomas, Beatrice Smith, and Barbara Williams, the girl friend of appellant[1] (Tr. 35, 51, 71-72, 86-87, 139). Appellant, who at that time lived with his mother at her home (Tr. 260), arrived home at about 10:00 p.m. (Tr. 35-36, 51-52, 70-71, 262). After appellant ate his dinner, he joined the card game in progress. However, soon thereafter an acrimonious dispute developed between appellant and his girl friend (Tr. 35-36, 52, 139). She threw in her hand, and appellant reacted violently. He stood up, struck Miss Williams twice in the face and dragged her from the card table, which was located in the kitchen, into the living room (Tr. 35-36, 42, 53, 58, 72, 140). Mr. Thomas, who "could hear licks being passed in the [living] room and . . . heard her screaming" (Tr. 53), intervened and attempted to abate appellant's attack (Tr. 43, 48, 59-60, 64, 72-73, 140). Appellant's mother, the decedent, also attempted to intervene and came from the kitchen with a dish which she heaved against the wall (Tr. 43-44, 54, 60, 72-73, 89-90, 266), hitting no one (Tr. 55-56, 260, 275).

Carolyn Jackson, the eleven-year-old granddaughter of the decedent and niece of appellant, who lived with them both, was in the living room engrossed in her homework when these events began (Tr. 7-10, 70-71). In addition to corroborating the testimony of the witnesses who preceded her (Tr. 70-73), she testified that after the decedent threw the dishes she tripped over the rug and fell to the floor[2] (Tr. 72-73, 91-92). "That's when Paul

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[1] Mr. Thomas is frequently referred to in the record as Mr. Tom, and Mrs. Smith is frequently referred to in the record as Miss Bea (Tr. 72, 86-87).

[2] She testified that when her grandmother fell she did not strike her head (Tr. 103).

[appellant] came after her" (Tr. 73). Carolyn related that while her grandmother was "on the floor," appellant was "kneeling over her" and came upon her head and face with his fists; then "he kicked her" on the left side of her face and head with his foot (Tr. 73, 93-94, 100, 102-103).

The police, who were summoned by Miss Williams (Tr. 37), were initially denied entrance to the house by appellant. Carolyn Jackson described what then happened: "[Appellant] told the policeman not to come in the house, if he did, he was going to shoot them with his .42 [*sic*] pistol . . . . [T]hen my grandmother told the police that Paul didn't have nothing in his pocket. I seen Paul's feet kick . . . . [Grandmother] screamed . . . 'Help!'" (Tr. 74-75, 98). Carolyn Jackson then "went to Miss Bea's house" (Tr. 75).

Officer James M. Freeman, Jr., of the Metropolitan Police testified that while on duty on the night in question he and his partner, Officer Bernard T. Howery, received a radio run for disorderly conduct at 1413 Carrollsburg Place (Tr. 104-105). Upon arrival they knocked on the door but were denied entrance by appellant, who said, "If you come in I'm going to kill you . . . . I have one of the same things that you have in your hands" (Tr. 105-106). Officer Freeman observed[3] that appellant had "something shiny" in his hand; accordingly, he did not enter at that moment but made an effort to persuade appellant to leave the premises (Tr. 106). Officer Freeman gave the following account: "[I]t appeared he was looking down talking to someone . . . . I could see that he was kicking at someone . . . . At the time he was kicking, I heard screams. And it appeared that he must have been kicking a lady because it was a female voice" (Tr. 107). In response to each kick he heard the distressful cry of "Help!" (Tr. 107, 115). The officer, however, stated that he never actually saw the kick take effect upon the body of the decedent (Tr. 107, 115). When the

[3] The door evidently was partially opened (Tr. 113).

officers entered the room, they saw the decedent sitting on the floor in the corner of the kitchen with appellant standing about one foot away. The left side of her head was "bruised." However, she did not want to "press charges" against her son; she asked the police to remove him from the house, which they did (Tr. 108-112).

Later that night Carolyn Jackson returned to her home to sleep. As was her custom, she slept in the same bed with her grandmother (Tr. 77-78). The following morning upon awaking Carolyn observed that her grandmother "had two black rings around her eyes, and around her mouth was puffed up" (Tr. 78).[4] Later that day the decedent asked Carolyn to "go next door to Mr. Tom's house to get some Bufferin and some witch hazel for her face" (Tr. 78-79). The window shades in the house were adjusted to keep out the sunlight, which hurt the decedent's eyes (Tr. 79-80).

Several days passed without incident. On November 3 Carolyn awoke at 8:30 a.m. and went to school, leaving her grandmother in bed. At 3:30 p.m., when Carolyn returned from school, her grandmother was still in bed. Carolyn left the house to visit a girl friend with whom she did her homework and did not return home until 6:00 p.m. Again Carolyn noticed her grandmother in bed and still in an unchanged posture. Searching for vital signs of life, Carolyn placed her ear to her grandmother's breast but heard nothing. Carolyn went to the ice box to get some ice to cool her grandmother's head, "but she didn't move" (Tr. 81-82, 84). Volta L. Jackson was dead[5] (Tr. 68-69).

Dr. Rak Woom Kim, Deputy Coroner of the District of Columbia, a qualified expert in pathology (Tr. 205),

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[4] Beatrice Smith, who also observed the decedent on October 25, said, "I started to cry when I saw her face" (Tr. 141). William T. Newby, brother of the decedent, saw his sister on October 25 and fully corroborated the testimony of Carolyn and Mrs. Smith with regard to the condition of the decedent's face (Tr. 147-149).

[5] Volta Jackson was pronounced dead at D.C. General Hospital by Dr. S. Tipton at 12:20 a.m. on November 4, 1969 (Tr. 68-69).

performed an autopsy on the body of Mrs. Jackson on November 5, 1969 (Tr. 69, 206, 216). In his opinion her death resulted from an unnatural cause—a "massive"[6] (Tr. 235) subdural hematoma (*i.e.*, a hemorrhage under the surface of the skull) (Tr. 206-207), found on the left side of the decedent's head (Tr. 221-223). He testified that it was caused by trauma to the head (Tr. 208-209). In his expert opinion the subdural hematoma from which the decedent died was "between ten and twenty days old" at the time of her death (Tr. 210, 221, 230). In his opinion that time period could be established "with certainty" (Tr. 210). In response to hypothetical questions addressed to him, Dr. Kim said:

1. If there were no evidence of a head injury prior to being struck in the head by a man's fists and kicked by a man's foot, it was "likely" that such blows caused the subdural hematoma (Tr. 214-215).

2. If the decedent had fallen without striking her head, the fall probably would not have caused the subdural hematoma (Tr. 214, 228-231, 233-234).

3. If two to three weeks prior to her death[7] the subdural hematoma had commenced and eleven days prior to death the decedent had received a number of kicks and

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[6] In the opinion of Dr. Kim, one could survive a small subdural hematoma (*i.e.*, between ten and twenty grams). However, the one suffered by the decedent was massive (150 grams) (Tr. 235).

[7] Although there is evidence that the decedent had not fallen nor suffered any head injuries prior to October 24 (Tr. 38, 55, 80, 82, 142, 149, 152, 256-257), appellant testified that on October 17 he was asleep with his girl friend, Barbara Williams, in his mother's home when his mother entered the room. While trying "to tickle [his] feet she fell on the right side of the couch" (Tr. 270); however, he did not know if she fell hard (Tr. 271) and did not know if she suffered any bruises. He said he could not see her the following day because the house was filled with smoke from frankfuters she had burned while cooking during the night (Tr. 279-280). Appellant stated that the decedent did not complain of any head injury from October 17 to October 24. (Tr. 280). There was some evidence that she was not injured from the fall on October 17 and that the fall did not occur within the time period designated by Dr. Kim (Tr. 44-48).

blows to the head, it was "very likely" that such kicks and blows "hastened" her death (Tr. 215, 234).

On cross-examination of Dr. Kim appellant's counsel asked the following questions and received the following answers:

> Q. Was there anything that would enable you to say that this subdural hemorrhage was, as a matter of reasonable medical certainty, caused by a blow on the 24th of October?
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> * * * *
>
> A. That I would say very likely.
> Q. Can you say that as a reasonable medical certainty?
> A. Yes, reasonable. (Tr. 230).

Appellant's counsel adduced from Dr. Kim that there is a relationship between the development of a subdural hematoma and the use of alcohol,[8] especially in older people[9] (Tr. 225). A blow to the head of such a person could be more trivial and still cause the hematoma if it occurred "at a critical moment"[10] (Tr. 226-228). Dr. Kim, however, emphatically stated that the use of alcohol by the decedent and its effect on her liver were not associated with her death[11] (Tr. 224).

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[8] Appellant contended that the decedent consumed large amounts of alcohol (Tr. 39, 229) and therefore was more susceptible to the development of a subdural hematoma. There was abundant testimony that her consumption of alcohol was moderate (Tr. 45-49, 57, 99, 115, 143, 150, 152-153, 252).

[9] The decedent was fifty-six years of age at her death (Tr. 225).

[10] Appellant relied heavily on Dr. Timothy Leary as an authority on subdural hemorrhages and cited his article appearing in 103 J.A.M.A. 897 (1934) (Tr. 227; see Brief for appellant at 11, 17). The "critical moment" mentioned by counsel (Tr. 227) was never described on the record. In Leary's study 54% of the population were "addicted to alcohol" (Tr. 228). In the case at bar, however, there was no evidence that the decedent was so "addicted" (Tr. 232).

[11] Dr. Kim testified that the decedent's liver "showed [a] moderate fatty change" (Tr. 224). The fatty degeneration was between twenty and thirty per cent. People who are chronic alcoholics show a fatty degeneration of the liver in excess of fifty per cent (Tr. 232).

In presentation of his case appellant called Mrs. Beverly Ann Wills, daughter of the deceased and sister of appellant (Tr. 249-250). She testified that appellant telephoned her the night of October 24 and stated he and his mother were arguing, and "he wanted me to come down there before he hurt her" (Tr. 250-251). In a subsequent phone call that evening "he said he was going to get her for pouring . . . boiling water on him" (Tr. 259) a few years ago (Tr. 253).

Appellant assumed the witness stand [12] in his own defense. He testified that on October 24, 1969, he came home at about 10:00 p.m. (Tr. 260-262). He joined the card game in which his mother, Miss Williams, Mrs. Smith and Mr. Thomas were participating. He asked Miss Williams for "some change." While he did not recall her response, he did recall that he countered by saying, "The only thing I ask you to let me hold some change and you didn't have to give me a whole lot of lip about it" (Tr. 262-263). Appellant "slapped her face" and took her into the living room (Tr. 283); when Mr. Thomas attempted to intervene, and appellant struggled and said "What's wrong? There is nothing happened here. She smacked me and I smacked her back" (Tr. 263). The decedent emerged from the kitchen into the hall and threw some plates (Tr. 264). Appellant indicated that he was never in danger of being hit (Tr. 266, 275). When the decedent's [13] hands were empty appellant [14] grabbed her, and they both fell [15] to the floor (Tr. 267). He testified that his mother "fell" two or three times, but he

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[12] As a result of a *Luck* ruling (Tr. 5-6) appellant admitted on direct examination that he had been convicted of theft of government property in 1966 (Tr. 261).

[13] The decedent weighed 130 pounds and was 5'5" tall at the time of her death (Tr. 206).

[14] Appellant weighed over 170 pounds and had no physical ailments (Tr. 285).

[15] Appellant did not know if his mother hit her head when she fell on October 24 (Tr. 280).

denied ever hitting her with either fist or foot (Tr. 267, 284). When the police arrived, his mother was seated on the floor of the kitchen with her "legs straight out" (Tr. 281) and distressfully crying for help (Tr. 269-270, 277-278). Although appellant said he was not enraged (Tr. 273), he admitted he was kicking the stove; and when his mother cried for help, he inquired of her, "What's wrong?" (Tr. 269-270, 277-278).

Before resting his case appellant called Dr. Marion Mann of the Department of Pathology at Howard University, an expert in pathology (Tr. 288). Dr. Mann stated that while subdural hematomas tend to occur at the extremes of life (*i.e.*, among infants and the aged), as well as with "acute" [16] alcoholics, almost all of them are related to trauma; they are very rarely spontaneous (Tr. 289-290). Assuming the decedent fell on October 17 and fell again on October 24, the day she sustained blows to the head from a beating, the witness, in giving his opinion as to the cause of death, stated, "I would say that the fall of the 24th or the blows . . . better than the fall of the 17th of October." The witness would not, however, rule out any of the three as a possible cause of death (Tr. 293-294). On cross-examination Dr. Mann noted further that "external evidence of trauma is very important," and the fact that there was none after the fall on October 17 but was readily apparent after the strife of October 24 indicated that the more severe injuries were sustained on October 24. The fact that the decedent suffered from headaches following the incident on October 24 was also of "great significance" (Tr. 294-295). The witness declared it to be a "known fact" that an incipient subdural hematoma (which may have occurred on October 17) which is followed by kicks and punches to the traumatized area will expand the clot and thereby hasten death or cause a non-fatal hematoma to become fatal (Tr. 295-296). He stated that a fall, such as the one alleged to have occurred on October 17, could

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[16] See footnotes 8 and 10, *supra*.

cause a non-fatal subdural hematoma, but that when aggravated by more severe trauma could become fatal (Tr. 296). Indeed, where there have been both a great and a trivial trauma, it is more likely that the hematoma was caused by the great trauma (Tr. 298).

At the conclusion of appellant's case he renewed his motion for judgment of acquittal (Tr. 237, 299), asserting, *inter alia*, that the Government failed to prove the cause of the decedent's death (Tr. 237-239). The motion, as before (Tr. 241), was denied (Tr. 299).

ARGUMENT

I. There was sufficient evidence of the cause of death.

(Tr. 35-36, 42-44, 52-64, 72-73, 89-94, 100-103, 139-140, 206-221, 230-234, 289-296, 309).

Appellant asserts that the Government's evidence was insufficient to prove that his acts caused the death of his mother and that accordingly the court erred in failing to grant his motion for judgment of acquittal. He further contends that the Government's evidence established only a possibility that his assault upon his mother with his fist and with his foot caused her death. We submit that these contentions are meritless.

In the case at bar the decedent intervened in an acrimonious and violent attack by appellant on his girl friend (Tr. 35-36, 42-44, 52-54, 58-60, 64, 72-73, 89-90, 139-140, 266). In the course of intervening to lend aid, the decedent slipped on a rug and fell [17] to the floor (Tr. 72-73). Appellant then redirected his vengeance toward his mother and came upon her head with his fist and foot (Tr. 73, 93-94, 100, 102-103). Now he claims that because her fall preceded his sanguinary attack and because she may have fallen a week earlier, the Government failed in its proof. There was, however, copious expert

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[17] See footnote 2, *supra*. There is no evidence that she struck her head in the fall; see footnote 15, *supra*.

testimony by Dr. Kim which was augmented by that of appellant's own expert witness, Dr. Mann, establishing the cause of death as a subdural hematoma (Tr. 206-207), which was caused by blows to the decedent's head. Dr. Kim stated that if within ten to twenty days before death (Tr. 210, 221, 230) the decedent had suffered no injuries other than those to her head by the fists and kicking of another person, then it was likely that such blows were the cause of her death (Tr. 214-215). He further stated that if an incipient subdural hematoma appeared one to two weeks prior to the blows inflicted by appellant, then it was "very likely" that such kicks and blows "hastened" her death[18] (Tr. 215, 234). Dr. Kim added that it could be said with "reasonable medical certainty" that the blows which caused the death of the decedent were inflicted on October 24, the night appellant beat his mother (Tr. 230). The thrust of his testimony was corroborated by that of Dr. Mann (Tr. 289-290, 293-296). From this expert testimony[19] we submit, that the

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[18] "[T]hat opposing inferences could be drawn is not determinative. 'It is for the jury to consider these opposing possibilities and to draw the appropriate inferences.'" *United States* v. *Harris*, D.C. Cir. No. 22,742, decided August 12, 1970, slip op. at 30, quoting from *Anderson* v. *United States*, 406 F.2d 529, 532-533 (8th Cir. 1969).

[19] Appellant also characterizes as "patently erroneous" (Brief for appellant at 23) the court's instruction to the jury which perfectly conforms to the standard instruction on expert testimony. JUNIOR BAR SECTION OF D.C. BAR ASS'N, CRIMINAL JURY INSTRUCTIONS FOR THE DISTRICT OF COLUMBIA, No. 16 (1966). He contends that by instructing the jury that it was "not bound by the opinion" (Tr. 309) of experts the court made it necessary for the jury to speculate as to the cause of death.

Expert witnesses without personal knowledge of facts base their opinion on facts already in evidence when presented in the form of a hypothetical question. Within the framework of the hypothetical question, the interrogator may make any reasonable assumption based on any fact in evidence and may omit any fact in evidence. When the hypothetical question is not founded on all the facts or is based on false assumptions, such defects affect only the weight of the answer. If the jury disbelieves some of the facts employed in the hypothetical question and upon which the expert opinion is founded, it is free to disregard the opinion. *United States* v. *Johnson*, 319

evidence easily complied with the legal sufficiency standard.[20]

II. The court's instruction on cause of death, which included the instruction requested by appellant, was proper.

(Tr. 241-244, 300, 311-312)

At the bench appellant's counsel presented the court with five proposed instructions, the first two of which dealt with causation[21] (Tr. 241-244). The court thought the first two were "somewhat duplicative" (Tr. 244, 300) and ruled that it would give only the first one (Tr. 300). In the actual charge to the jury the court included the

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U.S. 503 (1943); *United States* v. *(Elroy) Carter*, D.C. Cir. No. 22,912, decided June 5, 1970, slip op. at 4, citing *Adams* v. *United States*, 134 U.S. App. D.C. 137, 142, 413 F.2d 411, 416 (1969); *cf. Riley* v. *United States*, 96 U.S. App. D.C. 258, 225 F.2d 558 (1955).

[20] *Crawford* v. *United States*, 126 U.S. App. D.C. 156, 375 F.2d 332 (1967); *Curley* v. *United States*, 81 U.S. App. D.C. 389, 160 F.2d 229, *cert. denied*, 331 U.S. 837 (1947).

[21] Appellant's Proposed Instruction No. 1 was as follows:

> The evidence in this case shows that the cause of death of Volta Lucy Jackson was a subdural hematoma. If, upon consideration of all the evidence, you find that it is as probable that the bleeding which caused this blood clot was precipitated by accidental or natural causes as that it was precipitated or hastened by an act of Paul D. Jackson, then it is your duty to find the defendant not guilty and to acquit him.

Appellant's Proposed Instruction No. 2 was as follows:

> It is the duty of the prosecution to prove beyond a reasonable doubt that the subdural bleeding which was the primary cause of the death of Volta Lucy Jackson was precipitated by an unlawful act of Paul D. Jackson. If, upon consideration of all the evidence, you find that it is merely possible that such an unlawful act precipitated the bleeding, and that it is equally possible that such bleeding was precipitated by an accident, or by Mrs. Jackson's own act, then the government has failed to sustain its burden, and you should find the defendant not guilty.

appropriate portion of standard instruction No. 83[22] (Tr. 311) in addition to appellant's proposed instruction No. 1 (Tr. 312). Appellant now asserts that the court's refusal also to give his proposed instruction No. 2 was prejudicial error.

We begin with the settled proposition recently reiterated in *(William) Carter* v. *United States*, 138 U.S. App. D.C. 349, 353, 427 F.2d 619, 623 (1970):

> The court was not bound to accept the language which counsel employed in framing the instruction. *Agnew* v. *United States*,[23] 165 U.S. 36 (1897); *Ramey* v. *United States*, 118 U.S. App. D.C. 355, 336 F.2d 743, *cert. denied*, 379 U.S. 840 (1964); *Wheeler* v. *United States*, 82 U.S. App. D.C. 363, 165 F.2d 225 (1947), *cert. denied*, 333 U.S. 829 (1948).

The language used and meaning conveyed in appellant's two proposed instructions were so similar that the court merely made a selection between them, noting that to give both would be duplicitous (Tr. 244, 300). A reading of both shows the court's ruling to have been sound.

There remains to be considered only whether the causation instruction as given by the trial court was adequate. The instruction was the standard one based on *United States* v. *Hamilton*, 182 F. Supp. 548 (D.D.C. 1960). It was a fair and accurate statement of the law.

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[22] CRIMINAL JURY INSTRUCTIONS, *supra* note 19, No. 83, is the instruction on murder in the first degree and includes the instruction on causation. Of course, the portion of the instruction applicable to murder in the first degree was deleted from the court's rendition of the charge on causation.

[23] In *Agnew*, *supra*, the Supreme Court added that the court in giving its instructions is not "bound to repeat instructions already given in different language." 165 U.S. at 51.

CONCLUSION

WHEREFORE, appellee respectfully submits that the judgment of the District Court should be affirmed.

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